IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11512 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GANDABHAI @ RAJUBHAI MANKABHAIRABARI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 11512 of 2001

MR AR SHAIKH for Petitioner No. 1

MR S.S. PATEL, AGP for Respondent State

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 17/01/2002

ORAL JUDGEMENT

The petitioner came to be detained by virtue of an order dated 15th August, 2001 passed by the Commissioner of Police, Surat City in exercise of power

under Section 3 of the PASA Act. The petitioner seeks to challenge the said order by this petition under Article 226 of the of Constitution of India.

2. The grounds of detention indicate that the petitioner has been branded as a dangerous person. The detaining authority has considered one offence registered against the detenu at Mahidharpur Police Station. The sponsoring authority has recorded statements of two anonymous witnesses on 23.7.2001, which have been verified by the detaining authority on 8.8.2001. The detaining authority observed that the detenu's activities are that of a dangerous person and are detrimental to public order. The detaining authority recorded a satisfaction that the petitioner is required to be immediately prevented from pursuing his illegal and anti-social activities and resorting to less drastic remedy under ordinary law is not possible as immediate prevention is necessary and therefore, passed the order in exercise of powers under Section 3 of the PASA Act.

3. Learned Counsel for the petitioner contended that the detenu was in judicial custody when the order was passed. The satisfaction recorded by the authority for the need for exercise of powers under Sec. 3 of the PASA Act on account of immediate need for preventing the detenu from pursuing activities cannot be considered as genuine. So far as statements are concerned, he submitted that there is no material to indicate that the power was properly exercised by the detaining authority under Section 9(2) of the PASA Act after undertaking due enquiry and verification regarding genuineness of the fear expressed by the witnesses and the need for use of power under Section 9(2) of the PASA Act, in comparison to the right of the detenu envisaged under Art. 22 of the Constitution of India. He has placed reliance on the decision of this Court in Bai Amina Vs. State of Gujarat, reported in 22 GLR 1186 and subsequent judgements wherein the said decision has been followed.

4. Learned AGP Mr. S.S. Patel has opposed this petition.

5. Having regard to the rival side contentions it is amply clear that the detenu was in judicial custody when the order was passed. The detaining authority observed that he may apply for bail and on getting bail, may pursue his illegal activities. This is without any basis and is not permissible under the law. Getting bailed out is different than applying for bail. In the instant case, the stage for application of bail had also not even

reached. The detenu was in judicial custody and therefore, the order would stand vitiated on this ground alone in view of the decision of the apex Court in Amritlal and ors. Vs. Union Government, reported in AIR 2000 SC 3675, wherein it is observed that there must be cogent material before the detaining authority for passing the order of detention that the detenu is likely to be released on bail. Inference has to be drawn from available material on record. In absence of any such material, such inference cannot be drawn. The apex Court observed that likelihood of detenu moving an application for bail is not sufficient and it is different from likelihood of the detenu being released on bail. In view of the above decision, which is squarely applicable to the facts of the present case, the petition deserves to be allowed.

5.1 So far as statements are concerned, they have been verified by the detaining authority on 23.7.2001. There is nothing to indicate that the detaining authority examined the allegations made by the anonymous witnesses while considering social background of the detenu and the witnesses' anticedents and other relevant aspects to ensure that the fear expressed by the witnesses is genuine and not imaginery or by way of a camaflague used to cover up his own activities. The use of power under Section 9(2) of the PASA Act therefore cannot be considered as based on cogent material. This would infringe the right of the detenu envisaged under Art. 22(5) of the Constitution of India. The order of detention therefore would be rendered invalid for the foregoing reasons. The petition therefore deserves to be allowed.

6. The petition is therefore, allowed. Order of detention dated 15th August, 2001 passed by the Commissioner of Police, Surat City against the detenu is quashed and set aside. Detenu Gandabhai @ Rajubhai Mankabhai Rabari be released from detention forthwith, if not required in any other case. Rule made absolute. No costs. Direct service permitted.

(A.L.Dave,J.)
*/Mohandas